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MAS ANITA ABDULLAH

v.

LEW WAI KOUNG

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COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA

ABDUL AZIZ RAHIM JCA

MOHAMAD ARIFF YUSOF JCA

[CIVIL APPEAL NO: W-02(NCVC)(W)-2887-12-2012]

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27 MAY 2014

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CIVIL PROCEDURE: *Writ of summons - Writ of possession - Vacant possession of premises - Order for vacant possession obtained - Recovery of vacant possession - Whether by way of s. 234(2) of National Land Code - Whether writ of possession required - Rules of Court 2012, O. 45 rr. 3(1)(a), 3(2) - Specific Relief Act 1950, s. 7(1)*

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LAND LAW: *Tenancy - Forfeiture of tenancy - Powers of re-entry - Vacant possession of premises - Order for vacant possession obtained - Re-entry by way of s. 234(2) of National Land Code - Whether respondent could enforce order by entry into tenanted premises without a writ of possession - Rules of Court 2012, O. 45 rr. 3(1)(a), 3(2) - Specific Relief Act 1950, s. 7(1)*

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The respondent rented out his house to the appellant under a tenancy agreement for a period of two years with a monthly rental of RM750. The appellant defaulted in the payments of the monthly rentals for several months. The respondent, therefore, commenced an action in the Sessions Court to recover the arrears of rentals as well as to recover vacant possession of the house.

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The respondent obtained an order for the payment of rentals and vacant possession against the appellant. In taking possession of the house pursuant to the court order, the respondent elected not to apply for a writ of possession pursuant to s. 7(1) of the Specific Relief Act 1950 ('SLA') read with O. 45 r. 3(1)(a) and r. 3(2) of the Rules of Court 2012 ('ROC'). Instead, the respondent elected to proceed under s. 234(2) of the National Land Code ('NLC'), by re-entry onto the land and not by an action in court. The appellant commenced the present action and sought a declaration to challenge the legality of the respondent's

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action in taking possession of the house without a writ of possession pursuant to O. 45 r. 3(1)(a) and r. 3(2) of the ROC and in contravention of s. 7(1) of the SLA. On the contrary, the

respondent contended that since he proceeded the action *vide* s. 234(1) of the NLC, the compliance of s. 7(1) of the SRA and O. 45 r. 3(1)(a) and r. 3(2) was not mandatory in order to enforce the Sessions Court order and filed an O. 14A of the ROC application to dismiss the appellant's claim. The High Court Judge ruled in favour of the respondent and dismissed the appellant's claim. Hence, this appeal. The issue for determination was whether the respondent, having obtained an order from the Sessions Court, could enforce the order by entry into the tenanted premises without a writ of possession issued under O. 45 r. 3(1)(a) and r. 3(2) of the ROC.

Held (allowing appeal with costs)

Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

- (1) Unlike O. 45 r. 3 of the ROC, s. 234 of the NLC spoke about enforcement of 'forfeiture' and not the enforcement of a judgment or order. In the present case, the forfeiture was enforced by the respondent by way of an action in the court because the respondent had obtained an order for vacant possession from the Sessions Court. Having obtained the said order, the respondent had to take the further step of obtaining leave of the court for the issuance of a writ of possession in order to enforce the judgment, as required by s. 7(1) of the SRA and O. 45 r. 3(1)(a) and r. 3(2) of the ROC. The words 'an action in the court' as found in s. 234(2) of the NLC did not exempt the respondent from compliance with O. 45 r. 3(1)(a) and r. 3(2). (paras 28 & 29)

Bahasa Malaysia Translation Of Headnotes

Responden telah menyewakan rumahnya kepada perayu di bawah suatu perjanjian penyewaan untuk tempoh dua tahun dengan sewa bulanan sebanyak RM750. Perayu telah gagal membayar sewa bulanan untuk beberapa bulan. Oleh itu, responden telah memulakan suatu tindakan di Mahkamah Sesyen untuk menuntut tunggakan sewa serta mendapatkan milikan kosong rumah tersebut. Responden telah memperoleh penghakiman untuk bayaran sewa dan milikan kosong terhadap perayu. Dalam mengambil milikan semula rumah menurut perintah mahkamah, responden telah memilih untuk tidak memohon writ pemilikan menurut s. 7(1) Akta

- A Relief Spesifik 1950 ('ARS') dibaca bersama A. 45 k. 3(1)(a) dan k. 3(2) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Selain itu, responden memilih untuk meneruskan di bawah s. 234(2) Kanun Tanah Negara ('KTN'), dengan masuk semula ke tanah, iaitu di bawah bahagian pertama s. 234(2), dan bukan melalui tindakan mahkamah. Perayu telah memulakan tindakan ini dan memohon deklarasi untuk mencabar kesahihan tindakan responden dalam menuntut semula pemilikan rumah tanpa writ pemilikan menurut A. 45 k. 3(1)(a) dan k. 3(2) dan KKM dengan melanggar s. 7(1) ARS. Sebaliknya, responden menegaskan bahawa oleh kerana responden meneruskan tindakan melalui s. 234(1) KTN, pematuhan s. 7(1) ARS dan A. 45 k. 3(1)(a) dan k. 3(2) adalah tidak wajib untuk menguatkuasakan perintah Mahkamah Sesyen dan memfailkan permohonan di bawah A. 14A KKM untuk menolak tuntutan perayu Mahkamah Tinggi membuat keputusan memihak kepada responden dan menolak tuntutan perayu. Oleh itu, rayuan ini. Isu yang perlu dipertimbangkan adalah sama ada responden, setelah mendapat perintah daripada Mahkamah Sesyen, boleh menguatkuasakan perintah itu dengan memasuki premis yang disewakan tanpa writ pemilikan yang dikeluarkan di bawah A. 45 k. 3 (1)(a) dan k. 3(2) KKM.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

- F (1) Tidak seperti O. 45 r. 3 KKM, s. 234 KTN menyatakan tentang penguatkuasaan 'pelucuthakan' dan bukan penguatkuasaan sesuatu penghakiman atau perintah. Dalam kes ini, pelucuthakan tersebut dikuatkuasakan oleh responden melalui tindakan mahkamah kerana respondent telah mendapatkan suatu perintah bagi milikan kosong daripada Mahkamah Sesyen. Setelah memperoleh perintah tersebut, responden haruslah mengambil langkah seterusnya untuk mendapatkan kebenaran mahkamah untuk pengeluaran writ pemilikan bagi menguatkuasakan penghakiman tersebut, sebagaimana yang dikehendaki oleh s. 7(1) ARS dan A. 45 k. 3(1)(a) dan k. 3(2) KKM. Perkataan 'suatu tindakan di mahkamah' seperti terkandung di dalam s. 234(2) KTN tidak mengecualikan responden daripada mematuhi A. 45 k. 3(1)(a) dan k. 3(2).

Legislation referred to:

National Land Code, s. 234(1)

Rules of Court 2012, O. 14A, O. 45 rr. 3(1)(a), 3(2)

Specific Relief Act 1950, s. 7(1)

*For the appellant - Vincent Tey Wei Seng; M/s Jublin Tan & Tey**For the respondent - Yau Lap Ho; M/s Yau Lap Ho & Co**[Editor's note: For the High Court judgment, Mas Anita Abdullah v. Lew Wai Kiong [2013] 3 CLJ 737; [2013] 6 CLJ 782.]**Reported by Sandra Gabriel***JUDGMENT****Hishamudin Mohd Yunus JCA:**

[1] This appeal is against the decision of the High Court Judge of Kuala Lumpur (Civil Division) on a point of law raised by the respondent/defendant by way of an O. 14A application (O. 14A of the Rules of Court 2012).

[2] The learned High Court Judge had, on the point of law raised, ruled in favour of the respondent/defendant and, accordingly, had dismissed the appellant's/plaintiff's claim against the defendant.

[3] The issue of law posed to the learned High Court Judge in the O. 14A application is whether the landlord/defendant (the respondent in this appeal), having obtained an order from the Sessions Court for the payment of rentals and vacant possession against the tenant/plaintiff (the appellant in this appeal), the landlord/defendant, may, thereafter, enforce the order by entry into the tenanted premises (the house) without a writ of possession issued under O. 45 r. 3(1)(a) and r. 3(2) of the Rules of Court 2012.

[4] If the answer by the court is in the affirmative, then the court may proceed to dismiss the appellant's/plaintiff's claim.

[5] On the other hand, if the answer is 'No', then, judgment must be entered in favour of the appellant/plaintiff as prayed.

[6] The High Court answered the question in the affirmative. Hence, the present appeal.

- A [7] The reason given by the learned High Court Judge is as follows:

Court's interpretation of the legal provisions

- B There are various ways for the defendant, as owner of the premises, to enforce the judgment in order to recover possession of the premises. Should the defendant elect to enforce the judgment for possession of immovable property under O. 45 r. 3 of the ROC, then the defendant is required to obtain the leave of the Court first, followed by the issue of the Writ of Possession?

- C O. 45 r. 3(1) states that a judgment or order for the giving of possession of immovable property "may be enforced by one or more of the following means" namely, a Writ of Possession, or in the case in which rule 5 applies, an order of committal. It must be noted that the word used is "may" and not "shall". This means that there may be more than the one or two ways provided in O. 45 r. 3(1)(a) and (b) of the ROC for the defendant to enforce the judgment for possession of his immovable property. It is therefore open to the defendant to elect whether to enforce the judgment under O. 45 r. 3 of the ROC or by other means.

- E In this case, the defendant elected not to apply for a Writ of Possession under O. 45 r. 3 of the ROC. Instead, he elected to proceed under s. 234(2) of the NLC, when the plaintiff, as tenant, had breached the provisions of the Tenancy Agreement by not paying rental or arrears of rental to the defendant as owner and landlord of the premises, by re-entry onto the land i.e. under the first limb of the said s. 234(2), and not by action in Court.

- F As stated in s. 234(2) of the NLC, the defendant's re-entry onto the land is subject to the provision of any other written law for the time being in force. In this case, the other written laws which are relevant are the ROC and the SRA. O. 45 r. 3 of the ROC, as I had stated earlier, does not make it mandatory for the defendant to enforce the judgment under that provision and to obtain a Writ of Possession.

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- H [8] On 19 February 2013, we have allowed the appellant's appeal with costs.

[9] We shall now give our grounds.

- I [10] From now onwards, we shall be referring to the appellant as the 'plaintiff', and to the respondent as the 'defendant'.

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A [15] Thereafter, armed with this default judgment, the defendant re-entered the house and took possession of the same from the plaintiff.

B [16] In taking possession of the house pursuant to the court's order, the defendant did not apply for a writ of possession as required by s. 7(1) of the Specific Relief Act 1950 ('SRA') read with O. 45 r. 3(1)(a) and r. 3(2) of the Rules of Court 2012.

[17] The plaintiff protested.

C [18] The plaintiff thus commenced the present action seeking a declaration to challenge the legality of the defendant's action in taking possession of the house without a writ of possession pursuant to O. 45 r. 3(1)(a) and r. 3(2) of the Rules of Court 2012 and in contravention of s. 7(1) of the SRA. There is also
D the further prayer in the plaintiff's statement of claim that, in the event the court were to rule that the taking of possession of the house by the defendant was unlawful, the defendant was to restore to the plaintiff within seven days all moveable properties and documents of the plaintiff that were taken by the defendant
E from the house.

[19] On 10 September 2012, the defendant filed the O. 14A application.

F [20] In our judgment, in the present case, since the defendant had obtained an order for vacant possession, therefore, s. 7(1) of the SRA and O. 45 r. 3(1)(a) and r. 3(2) shall apply if he wishes to enforce the court's order for vacant possession. The law is clear.

G [21] Section 7(1) of the SRA which states:

7. Recovery of specific immovable property

(1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner
H prescribed by the law relating to civil procedure.

[22] In the present case, the defendant has obtained an order for vacant possession from the Sessions Court. Thus for the purpose of the above provision he is:

I ... a person entitled to the possession of specific immovable property.

[23] Thus, it is mandatory for him to recover the property: **A**

in the manner prescribed by the law relating to civil procedure.

[24] Now, on the law relating to civil procedure, O. 45 r. 3(1)(a) and r. 3(2) of the Rules of Court 2012 stipulate: **B**

Enforcement of judgment for possession of immovable property
(O. 45 r. 3)

3. (1) Subject to these Rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means: **C**

(a) a writ of possession;

(b) in a case in which rule 5 applies, an order of committal.

(2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without leave of the Court except where the judgment or order was given or made in a charge action to which Order 83 applies. **D**

[25] We are, of course, mindful of s. 234(1) of the National Land Code ('the NLC') that was relied upon by the defendant to contend that compliance with s. 7(1) of the SRA and O. 45 r. 3(1)(a) and r. 3(2) is not mandatory in order to enforce the Sessions Court order. Section 234(1) of the NLC provides: **E**

234. Power of forfeiture **F**

(1) Every lease, sub-lease or tenancy exempt from registration, whether granted before or after the commencement of this Act, shall, subject to any express provision therein to the contrary, be liable to forfeiture if the lessee, sub-lessee or tenant for the time being: **G**

(a) breaches any of the provisions thereof, expressed or implied;

(b) is adjudicated bankrupt; or

(c) being a company, goes into liquidation. **H**

(2) The forfeiture of any lease, sub-lease or tenancy may be enforced by the person or body for the time being entitled to the reversion thereon either by re-entry onto the land or by action in the Court, but subject in the former case to the provisions of any written law for the time being in force. **I**

A [26] It is to be observed that s. 234(2) of the NLC envisages two situations, namely:

(a) the ‘by re-entry onto the land’ situation; and

B (b) the ‘by action in the court’ situation.

[27] With respect, we are not persuaded by the defendant’s argument that by reason of s. 234 of the NLC above, compliance with s. 7(1) of the SRA and O. 45 r. 3 is not mandatory.

C [28] In the present case, we accept that this is a case of ‘forfeiture’ by the defendant/landlord, a person entitled to the reversion in respect of the property in question. But, then, what was the course of action that the defendant, as the owner of the property, had taken to enforce the forfeiture (we have to be careful to note here that, unlike O. 45 r. 3, s. 234 of the NLC speaks of enforcement of ‘forfeiture’ and not the enforcement of a judgment or order)? Was the enforcement of the forfeiture by way of a ‘re-entry’ onto the property? Or, was it by way of ‘an action in the court’?

E [29] We are of the view that, in the present case, the forfeiture was enforced by the defendant by way of ‘an action in the court’. This is because the defendant had taken the trouble to obtain an order for vacant possession from the Sessions Court. However, the way that we view the matter, the defendant, having obtained an order for vacant possession, has only taken the first step towards enforcing his right to possession of the house: he has to take the further step of obtaining leave of the court for the issuance of a writ of possession in order to enforce the judgment, as required by s. 7(1) of the SRA and O. 45 r. 3(1)(a) and r. 3(2) of the Rules of Court 2012. In our judgment, the words ‘an action in the court’ as found in s. 234(2) of the NLC do not exempt the defendant from compliance with O. 45 r. 3(1)(a) and r. 3(2).

H [30] Accordingly, judgment is to be entered in favour of the plaintiff as prayed.

Appeal allowed with costs.

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